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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|----------------------|------------------|
| 09/945,204 | 08/31/2001 | David J. Domingues | P5725US (PIL0060/US) | 4507 |

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| EXAMINER |
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| ART UNIT | PAPER NUMBER |
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1789

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| MAIL DATE | DELIVERY MODE |
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02/25/2011

PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID J. DOMINGUES

Appeal 2009-012604
Application S.N. 09/945,204
Technology Center 1700

Before BRADLEY R. GARRIS, BEVERLY A. FRANKLIN, and
LINDA M. GAUDETTE, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Appellant appeals under 35 U.S.C. § 134 from the Examiner's rejection of claims 1, 3, 8, 10-13, 15, 16, 20, 22, 23, 25, 26, 36, 43, and 59-70. We have jurisdiction under 35 U.S.C. § 6.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Claim 1 is representative of the subject matter on appeal and is set forth below:

1. A packaged dough product comprising a low pressure container having therein at least two individual portions of a chemically leavened dough product, wherein each portion comprises an encapsulated basic active ingredient, a non-encapsulated acidic active ingredient, and a barrier material, wherein

at below baking temperature the barrier material encapsulates the basic active ingredient and separates the basic active ingredient from the non-encapsulated acidic active ingredient to inhibit reaction of basic active ingredient and acidic active ingredient,

the non-encapsulated acidic active ingredient is selected to have a solubility of greater than 35 kcal/mole in the dough composition below baking temperature and to be substantially soluble in the bulk dough composition during baking,

the barrier material degrades at or above the baking temperature to allow the basic active ingredient and the acidic active ingredient to come into contact in the dough composition and react to substantially leaven the dough composition during baking.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

| | | |
|-------------------------|--------------|---------------|
| Gulstad | 3,767,421 | Oct. 23, 1973 |
| Lonergan | 5,672,369 | Sep. 30, 1997 |
| Ray | 6,004,595 | Dec. 21, 1999 |
| Rea | 6,053,400 | Apr. 25, 2000 |
| Narayanaswamy | 6,261,613 B1 | Jul. 17, 2001 |
| Schaible, II (Schaible) | 6,365,210 B1 | Apr. 2, 2002 |

THE REJECTIONS

1. Claims 1, 3, 8, 10-13, 15, 16, 20, 22, 23, 25, 26, 36, 43, 59, and 60-65 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Narayanaswamy in view of Ray and Gulstad.
2. Claim 66 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Narayanaswamy in view of Ray and Gulstad as applied to claims 1, 3, 8, 10-13, 15, 16, 20, 22-23, 25-26, 36, 43, 59, 60-65, and 67 above, and further in view of Schaible.
3. Claims 67-70 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Narayanaswamy in view of Ray and Gulstad as applied to claims 1, 3, 8, 10-13, 15, 16, 20, 22-23, 25-26, 36, 43, 59, and 60-65 above, and further in view of Rea and Lonergan.

ISSUE

Did the Examiner err in determining that the combination of Narayanaswamy and Gulstad suggests the aspect of claim 1 wherein a “non-encapsulated acidic active ingredient is selected to have a solubility of greater than 35 kcal/mole in the dough composition below baking temperature and to be substantially soluble in the bulk dough composition during baking”?

We answer this question in the negative and AFFIRM.

ANALYSIS
(with Findings of Fact and Principles of Law)

We essentially adopt the Examiner's findings pertinent to the issue raised by Appellant for this rejection. We, therefore, incorporate the Examiner's position as set forth in the Answer. We add the following for emphasis only.

As an initial matter, Appellant's arguments are similar for each rejection such that our determination of the above-mentioned issue addresses each of the rejections. We, thus, focus on Rejection 1, and claim 1, and our determination made with respect to Rejection 1 is dispositive for all of the rejections. We also focus on the combination of Narayanaswamy in view of Gulstad only in resolving the above-mentioned issue. Any claim not separately argued will stand or fall with its respective independent claim. *See* 37 C.F.R. § 41.37(c)(1)(vii).

1. The Rejection of Claims 1, 3, 8, 10-13, 15, 16, 20, 22-23, 25-26, 36, 43, 59, and 60-65 under 35U.S.C. § 103(a) as being unpatentable over Narayanaswamy in view of Ray and Gulstad

Appellant admits that Narayanaswamy uses the same acidic leavening agent (the non-encapsulated acidic active ingredients as recited in Appellant's claim 1) as recited in claim 8 (sodium aluminum phosphate (col. 8, ll. 52-54 of Narayanaswamy). Br. 12-13. Yet, Appellant argues that because Narayanaswamy does not disclose that the non-encapsulated acidic active ingredient must have a solubility of greater than 35 kcal/mole, the Examiner's position is in error. Br 12.

The Examiner rightly points out that Narayanaswamy teaches use of sodium aluminum phosphate as the non-encapsulated acidic active ingredient and therefore meets Appellant's claim regarding the solubility requirement because this is the same compound as set forth in Appellant's

claim 8, and, therefore, will have the claimed solubility requirement as set forth in Appellant's claim 1. Ans. 9.

Additionally, the Examiner states that Gulstad teaches that sodium aluminum phosphate is only nominally active at room temperature. Ans. 9. Gulstad teaches to effect leavening after storage and during the final cooking of the dough, and that leavening during cooking can be accomplished either by using leavening agents which are only nominally active at room temperature or by protecting the leavening ingredients from the moisture in the dough during storage and releasing them during cooking. Gulstad, col. 3, ll. 54-62. Gulstad teaches that sodium aluminum phosphate is a leavening agent that is only nominally active at room temperature. Gulstad, col. 3, ll. 63-67. The Examiner concludes that this teaching by Gulstad would have made it obvious to have chosen a nominally active acidic ingredient, such as sodium aluminum phosphate, as the non-encapsulated acidic active ingredient, for the reasons provided by Gulstad as discussed by the Examiner in the paragraph bridging pages 9-10 of the Answer.

For the reasons stated by the Examiner, we agree with the Examiner's implicit position that a non-encapsulated acidic active ingredient selected to have the solubility as recited in claim 1 would have naturally flowed from following the suggestion of the combination of Narayanaswamy in view of Gulstad. *See Ex parte Obiaya*, 227 USPQ 58, 60 (BPAI 1985), *aff'd mem.*, 795 F.2d 1017 (Fed. Cir. 1986) (holding that the recognition of another advantage flowing naturally from following the suggestion of the prior art cannot be the basis for patentability when the difference would otherwise be obvious). *See also In re Best*, 562 F.2d 1252 (CCPA 1977) and *In re Wilder*, 429 F.2d 447 (CCPA 1970).

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We therefore agree with the Examiner's conclusion of obviousness and affirm all of the rejections.

CONCLUSIONS OF LAW AND DECISION

Each rejection is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1).

AFFIRMED

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